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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME ZAMORA RAMIREZ,

Defendant and Appellant.

G045950

(Super. Ct. No. 10HF0027)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed in part, reversed in part and remanded.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was charged with, inter alia, raping Sonia C. and Leticia A. His defense was consent, but he was convicted as charged and sentenced to indeterminate life sentences under the One Strike and Three Strikes laws. He now contends: 1) The jury was improperly allowed to use the charged offenses to prove he had a propensity for sexual misconduct; 2) the judge unduly limited his cross-examination of Leticia; 3) the prosecution should have been required to prove the exact date on which the alleged crimes occurred; 4) the prosecutor committed misconduct by vouching for the victims' credibility; and 5) cumulative error compels reversal.

We reject these contentions and affirm appellant's convictions. However, we agree with him that there is insufficient evidence to support the trial court's finding he suffered a prior serious felony conviction, and the court erred in imposing a consecutive enhancement for that prior on one of the counts. We reverse the true finding on the prior serious felony allegation and remand the matter to the trial court for further proceedings on that charge. In all other respects, we affirm the judgment.

### FACTS

Appellant co-owned a dry cleaning shop. Because Sonia's husband Fernando worked at the shop, appellant became acquainted with her. Appellant also became friends with Sonia and Fernando's neighbors, O.E. and Raul H. They all socialized together from time to time. But in 2007, Sonia and Fernando separated, and Fernando moved out of their apartment.

On the night of October 11, 2008, Sonia, O.E., Raul and appellant went out to a nightclub with some friends. Sonia had a few drinks and was feeling dizzy, but she did not have any problems with appellant. In fact, up until that night, he had always been nice to her, and she considered him to be her friend. She was aware, though, that he was separated from his wife and known to be something of a "womanizer."

At about 1:00 a.m., Sonia and O.E. left the club and went to O.E.'s apartment. After downing a shot of tequila there, Sonia walked down the hallway to her

own apartment. She had made plans for her boyfriend Martin S. to come over to her place after she got home from the club. But when she arrived at her apartment, it was already past 2:00 a.m., and she promptly fell asleep in her living room.

About an hour later, she was awakened by a knock on her door. Thinking it was Martin, she opened the door to find not her boyfriend, but appellant. He asked her for some beers, and Sonia gave him a six-pack. She assumed he was partying with Raul and O.E. at their apartment and would return there once she gave him the beer. However, appellant said he wanted to have a drink at Sonia's place and asked her to open a beer for him. Sonia obliged but told appellant she was tired and wanted to go to sleep. She was hoping that appellant would leave and Martin would come over, but appellant refused to go.

He grabbed her by the arm and told her he would take her to the bedroom. Sonia thought he was joking, but he proceeded to lead her into the bedroom hallway. At that point, Raul entered the apartment, and when he saw appellant with Sonia, he became very upset. Although Sonia had been separated from Fernando for several months, Raul told appellant he should "respect a friend's wife." Sonia tried to explain that nothing was going on between her and appellant, but Raul wasn't buying it. He continued to berate appellant, and as their yelling intensified, Sonia feared they would wake the neighbors. She ordered them to leave, and eventually Raul did so. However, appellant stayed on at her apartment.

Sonia implored him to go straighten things out with Raul. But appellant said Raul was so mad he probably wouldn't listen to him or let him stay the night at his apartment. Unable to get appellant to leave, Sonia eventually gave him a blanket and told him he could sleep on the couch. Although she wasn't happy with the situation, she couldn't think of anything to do about it, given appellant's recalcitrance. She told him she was going to bed and left him alone in the living room.

She then retrieved her pajamas from her bedroom and went into her bathroom to change. While she was changing, she called Martin and told him not to come over. She had only been dating him a short period of time and did not want anyone to find out about their relationship.

When Sonia returned to her bedroom, she was startled to find appellant waiting for her there. He grabbed her and told her to lie down on the bed, but she sat down on a chair instead. He told her that, being separated from Fernando, she probably hadn't had sex for a long time and really "wanted it." Sonia told him that was none of his business, but he grabbed her, threw her down on the bed and got on top of her. She was saying "no, no" and struggling to get free, but appellant kept her down and continued talking about how much she probably "wanted it." Putting his hand underneath her pajamas, he inserted his finger inside her vagina. Then he replaced his finger with his penis and began raping Sonia.

Sonia continued to resist, and at one point she was able to free herself momentarily from appellant's grasp. However, he grabbed her and started penetrating her with even greater force and fury, and eventually she stopped struggling. She continued to beg him to stop, but he ignored her pleas and continued for several more minutes until he finally ejaculated on her leg. He then went into the bathroom and cleaned himself up with one of Sonia's towels.

When he returned to the bedroom, Sonia asked him why he had done that to her. He said he "was a man" and she probably "wanted it" because she hadn't had sex in a while. He also suggested she enjoyed it because her genital area was "wet." Moments later, however, appellant said he had made a mistake and wouldn't try to do it again.<sup>1</sup>

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<sup>1</sup> Sonia's testimony was conflicting as to the last part of what appellant told her. At first she testified appellant told her he *would* try to do it again, and then she testified he told her he *wouldn't* try to do it again.

After that, appellant left Sonia's apartment. He said he was going to go sleep at Raul's apartment, but when Sonia got up and looked out her door, she saw him out in the street near his car. By this time, it was almost daybreak on Sunday morning. Sonia did not call the police, but she was very worried and distraught. In fact, she was so concerned appellant may have given her a sexually transmitted disease (STD) she was unable to go to sleep.

Later that morning, at around 10:00 a.m., she went to O.E.'s apartment and discovered appellant there with his children. Sonia returned to her apartment and called Fernando. She told him appellant had been over at her apartment that night but – fearful of aggravating Fernando's high blood pressure – she did not tell him appellant had raped her. Fernando told Sonia to be careful with appellant because he was a player and very sexually active.

That made Sonia even more worried. She returned to O.E.'s apartment with the intention of talking to appellant about getting tested for STD's, but he left before she was able to do so. After he departed, Sonia broke down and told O.E. appellant had taken advantage of her and abused her sexually. O.E. told her to just forget about it and to chalk it up to a "night of drinks."

Two days later, on October 14, Sonia told Martin appellant had raped her, and the next day she called appellant.<sup>2</sup> She told him to get tested for STD's and to stay away from her apartment building. He got angry and hung up the phone. He continued to come around Sonia's apartment complex in the wake of their conversation.

On October 17, Sonia went to the doctor to get tested for STD's. During the visit, she gave a statement to the doctor's assistant about the rape. According to the assistant's notes, Sonia told her appellant ejaculated "in her," not on her.

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Sonia testified Martin urged her to call appellant, but Martin testified he did not do so.

On October 21, Sonia told Fernando everything that happened between her and appellant. He was upset and said she was stupid for allowing herself to be raped. He was also worried he would lose his job at appellant's dry cleaners. Nevertheless, Sonia decided to report appellant to the police that very day. Some officers had come to her apartment to investigate an unrelated incident at her complex, and while they were there, Sonia took one of them aside and told him she had been raped by appellant. She also showed the officer a bruise on her right arm and gave him the towel that appellant had used to clean up with after the rape. The towel was subsequently tested and determined to contain traces of appellant's semen.

Testifying for the defense, Raul stated that he and appellant went back to his apartment after they left the club on the night in question. They were drinking with O.E. in the early morning hours when appellant left for Sonia's apartment to get more beer. When he didn't return, Raul went looking for him. Noticing Sonia's door was open, Raul entered her apartment and saw her and appellant coming out of the hallway. According to Raul, they were laughing, playing and holding each other. He asked them what was going on, and they said nothing. He then confronted appellant, telling him it was disrespectful to be fooling around with Fernando's wife. However, appellant insisted he was not doing anything improper, and eventually Raul returned to his apartment.

Less than a year after this incident occurred, appellant was involved in another episode of alleged sexual misconduct. This time, his victim was a young immigrant named Leticia A. Leticia came to the United States from Mexico in December 2008, and two weeks later, she got a job at appellant's dry cleaners as an assembly line worker. Although she had entered the country illegally and was only 16 years old, she worked at the shop without incident until May 2009. At that time, her manager told her she would need to provide proper documentation if she wanted to keep her job. So, the following weekend, she went to the Santa Ana swap meet and obtained a counterfeit

work permit and a phony social security card. After she showed these documents to her manager, she was allowed to retain her job.

Leticia did not have much contact with appellant at work. He signed her paychecks, and she saw him at the shop on occasion, but they did not interact much, nor did they socialize outside work; she had no reason to believe appellant was setting his sights on her. However, on the morning of July 11, 2009, appellant instructed one of his employees, a man named Jose, to pick up Leticia at the shop. Although Jose told Leticia they were going to a motel to pick up some clothes, he took her to appellant's house instead. When they arrived there, Jose told her they needed to pick up some paperwork at the house, but as soon as she got out of the car, he drove off without her.

Appellant greeted Leticia and invited her into his home. He asked her to come upstairs with him, but she said she just wanted to wait in the living room. Appellant said, "No, come up," so she did. He then asked her to join him in the bedroom, and again Leticia balked, saying she would rather wait in the hallway. At that point, appellant pulled her into the bedroom, closed the door and started kissing and hugging her. She pushed him away and told him he shouldn't be doing those things because he was her boss. Appellant told Leticia he wasn't her boss "at that moment." He then pulled Leticia close to him and resumed kissing and hugging her. Feeling trapped, Leticia asked appellant if he was going to take her by force, and he told her not if she "put in her part." When she said she wasn't going to cooperate, he pushed her on the bed and threw himself on top of her.

Leticia told appellant that if he did anything to her, she was going to report him; it is unclear from her testimony whether she meant she was going to report him to the police or sue him.<sup>3</sup> Appellant told her he knew she was in the country illegally, and it

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<sup>3</sup> Leticia testified in Spanish. According to the court interpreter, the words Leticia used in her testimony were susceptible of both meanings, and unfortunately efforts to clarify this point only led to further confusion.

would be his word against hers. He then started taking off her clothes. Leticia resisted and repeatedly told appellant to leave her alone, but he forcibly removed her clothing, spread her legs and raped her.

Afterwards, appellant stepped out of the room to make a phone call, and Leticia got dressed. When he returned to the room, he told her Jose was waiting for her outside. Leticia was crying and upset when she got back into Jose's car. She started to tell him what happened, but he told her he didn't want to hear anything and was "only following orders." He then cranked up the radio and headed back to the cleaners. Along the way, they made a brief stop at a bank or office building. Leticia saw a security guard there, but instead of reporting appellant, she tried to pull herself together and act as though everything was okay.

When they arrived back at the cleaners, Leticia went about her usual duties. She did not tell anyone what happened because she was embarrassed and worried about being deported. However, Lorena T., a coworker, noticed that when Leticia arrived back at work that day, her hair was disheveled and her makeup was smeared. Leticia looked so worn and tired that Lorena gave her a ride home after their shift ended.

The following day was a Sunday, and on Monday Leticia was told not to come in to work. However, she did show up on Tuesday, with the intention of getting her final paycheck and quitting. She wanted to talk to appellant's partner Sharon G. about those matters, but Sharon was not available. Leticia did talk to several of her coworkers, though. At around 9:00 a.m., Flor A. approached her and asked her why she looked so sad. Leticia didn't want to talk to her at first, but when Flor told her she knew that Jose had taken her to appellant's house that day, Leticia told her what had happened. She then asked Flor how she knew that Jose had taken her to appellant's house, and Flor said that "it's not the first time they've done that."

A short while later, Fernando arrived at the shop, and Flor told him about the incident. Fernando then talked to Leticia and told her that appellant had also raped



Sonia. He urged Leticia to go to the police and assured her that, even though she was an undocumented immigrant, she would not get in trouble. Leticia told several other people about the incident at work that day, including Leo R. Leo, too, urged Leticia to report appellant, and after lunch, he drove her to the police station.

After giving a statement to the police, Leticia underwent a sexual assault exam. At the start of the exam, Leticia told nurse Toyetta Beukes that her legs were sore after appellant raped her and that she was still experiencing some genital bleeding and soreness. Beukes noticed bruising on Leticia's legs. Although she did not detect any signs of vaginal tearing or abrasions, she believed Leticia's condition was consistent with her claim she had been raped.

Appellant was arrested two days later, on July 16. That day, Leticia called the cleaners and spoke with Sharon. Sharon offered to give her money if she did not get the dry cleaners in trouble, but Leticia said the only thing she wanted was her final paycheck. Sharon told her she was sorry about what appellant had done to her and that she would have fired him if she had known he was like that.

Although Sharon was very supportive during that phone call, Leticia later found out that she had hired an attorney to help appellant. Apparently, the attorney had been questioning workers at the cleaners about Leticia's mental stability, and when Leticia discovered this, she was so upset she hired her own attorney and filed a civil suit against the cleaners.

Sometime after the suit was filed, Leticia was granted a temporary work permit to stay in the United States for four years. She also acquired the right to apply for permanent resident status when that permit expires. However, Leticia testified she never intended to become a permanent resident of the United States. Rather, she only wanted to stay in the United States for one year, earn some money and then return to Mexico. As of the time of trial, she had not received any money from her civil case, and in fact, she

had no desire to pursue it any longer. She said she just wants to put the whole affair behind her so she can go back to Mexico and get on with her life.

Testifying for the defense, Andrew Huang stated he was appellant's roommate on July 11, 2009, the date Leticia was raped. He said he did not see Leticia at his house that morning, nor did he hear any unusual noises coming from appellant's bedroom.

In closing argument, defense counsel asserted that both victims wanted to have sex with appellant. With regard to Sonia, counsel theorized that after sleeping with appellant, she was so panged by shame and regret that she cried rape to protect her reputation. Leticia, on the other hand, was characterized by the defense as an opportunistic gold digger. Defense counsel theorized she slept with appellant so that she could get money from him and stay in the United States.

The jury did not ratify these theories. Instead, it convicted appellant of raping Leticia and Sonia and sexually penetrating Sonia with a foreign object, i.e., his finger. The jury also found true allegations under the One Strike law that appellant victimized multiple women and that he committed the crimes against Sonia during the course of a burglary. In addition, the trial court found appellant had suffered a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a) and the Three Strikes law. The court sentenced appellant to 15 years to life, plus 80 years to life, in prison.

## I

Appellant contends the trial court erred in instructing the jurors they could use the charged offenses to prove he had a propensity for sexual misconduct. We disagree.

Over appellant's objection, the trial court instructed the jurors as follows: "If you decide that the defendant committed any one or more of the charged offenses, you may, but are not required to, conclude from that the defendant was disposed or inclined to

commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit any of the other charged offenses.

“If you conclude that the defendant committed any one or more of the charged offenses, that conclusion is . . . only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the other charged offenses. [¶] The People must still prove each charge beyond a reasonable doubt.” (CALCRIM No. 1191, as modified.)

As appellant admits, propensity evidence is generally admissible in sex crime cases, pursuant to Evidence Code section 1108.<sup>4</sup> That section provides that “[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101 [which sets forth the general prohibition against propensity evidence], if the evidence is not inadmissible pursuant to Section 352 [which calls for the exclusion of evidence if its probative value is substantially outweighed by the possibility it would prejudice the defendant].” (§ 1108.)

In his opening brief, appellant argued section 1108’s reference to “another sexual offense or offenses” was limited to *uncharged* sex crimes and did not encompass sex crimes that were alleged in the current prosecution. However, after appellant’s opening brief was filed, our Supreme Court rejected that argument in *People v. Villatoro* (2012) 54 Cal.4th 1152. Appellant now concedes that *Villatoro* is controlling here and that the jury was properly allowed to consider the charged offenses as proof he had a propensity for committing sexual offenses and was thus guilty of the other charged offenses.

Nevertheless, he argues the propensity instruction in this case was constitutionally defective because it did not require the jury to find the charges true

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<sup>4</sup>

Unless noted otherwise, all further statutory references are to the Evidence Code.

beyond a reasonable doubt as a prerequisite to their use as propensity evidence. In so arguing, appellant correctly points out that the jurors in *Villatoro* were specifically instructed that before they could use a charged offense as propensity evidence, the prosecution had to prove that offense beyond a reasonable doubt. (*People v. Villatoro*, *supra*, 54 Cal.4th at p. 1167.) However, *Villatoro* did not say that such an instruction was constitutionally required. (Cf. *People v. Reliford* (2003) 29 Cal.4th 1007 [upholding propensity instruction which allowed the jury to find uncharged sex offenses by a preponderance of the evidence].)

In any event, during closing arguments, the attorneys for both sides emphasized to the jurors that, in order to infer appellant had a propensity for committing sex crimes based on his commission of a charged offense, they would have to find he committed that offense *beyond a reasonable doubt*. Thus, to the extent the propensity instruction was ambiguous regarding the standard of proof applicable to the propensity determination, it is not reasonably likely the jurors applied a different standard. Moreover, the propensity instruction made it clear that, in the end, “The People must still prove each charge beyond a reasonable doubt.” Given everything the jurors were told, it is not reasonably likely they construed the instruction in a manner that violated appellant’s rights. Therefore, the instruction is not cause for reversal. (See *People v. Franco* (2009) 180 Cal.App.4th, 713, 720 [in assessing claim of instructional error, appellate court must consider the record as a whole, including the parties’ closing arguments, to determine whether there is a reasonable likelihood the jury construed the challenged instruction in a manner that violated the defendant’s rights].)

## II

Appellant also contends the trial court erred in restricting his cross-examination of Leticia. Alleging a violation of both state statutory law and federal constitutional law, he claims the court should have: 1) Afforded him greater leeway to

question Leticia about her immigration status; and 2) allowed him to question her about her sexual history. We will address these claims in turn.

Before trial, defense counsel informed the court that because Leticia was the victim of a violent sexual offense, she had been granted a so-called “U-Visa” to protect her from deportation during the course of the trial. (See 8 C.F.R. § 214.14 (2012).) The U-Visa would allow Leticia to stay in the country for up to four years, and after that she could then apply for permanent residency. Defense counsel argued the U-Visa evidence was relevant to show Leticia may have been motivated to falsely accuse appellant of rape in order to obtain favorable immigration benefits. However, the court excluded the evidence under section 352.<sup>5</sup>

One of the purposes of section 352 is to “prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) The statute gives trial judges broad discretion to exclude impeachment evidence, and any decision to do so will be afforded great deference on appeal. Indeed, the exclusion of impeachment evidence under section 352 will only be disturbed “on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Notwithstanding section 352, the exclusion of impeachment evidence may implicate a defendant’s Sixth Amendment right to confront and cross-examine adverse witnesses. However, the confrontation clause only “guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) Unlimited inquiry into collateral matters is not permitted. (*People v. Jennings*

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<sup>5</sup> Section 352 empowers courts to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

(1991) 53 Cal.3d 334, 372 .) Indeed, ““trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination.” [Citation.]” (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Unless the defendant can show the proposed cross-examination would have produced a significantly different impression of the witness’s credibility, the trial court’s exercise of its discretion in this regard will not be deemed to have violated the defendant’s confrontation rights. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680; *People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) No Sixth Amendment violation will be found if the jury is exposed to the essential facts from which it could appropriately draw inferences relating to the reliability of the witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 318.)

During her cross-examination, Leticia admitted she entered the country illegally and knowingly obtained and presented false documentation to her manager at work. She also admitted that after she filed her civil suit, she was given a temporary permit to stay in the country for four years and that she could apply for permanent residency when that permit expired. In light of the court’s pretrial ruling, defense counsel was not allowed to get into the fact that those immigration benefits stemmed from the federal government’s U-Visa program. But the fact Leticia received those benefits after she claimed she was raped could not have been lost on the jury. Not only did Leticia freely admit this on the stand, defense counsel used the admission as a tool to chip away at Leticia’s credibility in closing argument. In fact, one of the main themes of defense counsel’s closing argument was that Leticia had a strong motivation to falsify her claim against appellant to gain favorable immigration status.

Given the way the immigration issue played out, it is evident the jury was exposed to the core, essential facts from which it could appropriately draw inferences pertaining to Leticia’s credibility. The court did not abuse its discretion under section

352 in excluding reference to the U-Visa program, nor did such exclusion violate appellant's confrontation rights. No cause for reversal has been shown.

### III

That brings us to the issue of Leticia's sexual history. Pursuant to section 782, appellant moved to admit evidence that Leticia had a previous sexual relationship with Leo R. Leo was Leticia's coworker at the dry cleaners, and he was the one who took her to the police station when she finally decided to report appellant to the authorities.

In support of the motion, defense counsel submitted a declaration which alleged that Leticia and Leo conspired to cover up the fact that, prior to the alleged rape, they had a sexual relationship that lasted approximately one month. Defense counsel alleged Leticia intentionally concealed this relationship from the police and lied about it in her deposition in her civil case against the cleaners. According to counsel, this deceitful behavior supported the defense theory that Leticia had orchestrated an ongoing effort with others to best manage her rape accusation and to "give it a better chance for success both criminally and civilly."

At the hearing on the motion, the prosecutor stated that he had spoken to Leticia about her relationship with Leo, and during their conversation, Leticia admitted she had lied about her sexual history. More precisely, she admitted she had failed to disclose the fact that she had had sex with Leo before appellant raped her. However, she said the reason she lied was not to bolster her case against appellant, but because she was only 16 years old at the time, and she did not want to get Leo in trouble for having sex with a minor.

The trial court ruled Leticia's sexual relationship with Leo was inadmissible because it had no logical bearing on the credibility of the accusation she made against appellant. While the court recognized Leticia had not been truthful about her relationship with Leo, it determined that allowing the defense to question her about

that particular topic would amount to impeachment on a collateral issue that was not otherwise relevant to the case.

“Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions. A defendant may not introduce evidence of specific instances of the complaining witness’s sexual conduct, for example, in order to prove consent by the complaining witness. [Citation.] Such evidence may be admissible, though, when offered to attack the credibility of the complaining witness and when presented in accordance with the . . . procedures under section 782[.]” (*People v. Fontana* (2010) 49 Cal.4th 351, 362.)

Pursuant to that section, “A written motion must be made which includes an offer of proof of the relevancy of the evidence of sexual conduct and its relevancy in attacking the credibility of the complaining witness. If the court finds the offer of proof sufficient it shall order a hearing out of the presence of the jury at which the complaining witness may be questioned. If at the conclusion of the hearing the court finds the evidence relevant and not inadmissible pursuant to . . . section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.” (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757; see also *People v. Fontana, supra*, 49 Cal.4th at p. 362 [outlining procedural requirements of section 782].)

“The Legislature’s purpose in crafting these limitations is manifest and represents a valid determination that victims of sex-related offenses deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. [Citations.] By affording victims protection in most instances, these provisions also encourage victims of sex-related offenses to participate in legal proceedings against alleged offenders. [Citations.] Accordingly, our courts have properly exercised the discretion afforded by . . . section 782 ‘narrowly’ [citation], and . . . ‘[g]reat care must be taken to insure that this exception to the general rule barring evidence of a complaining witness’ prior sexual conduct . . . does not impermissibly encroach upon the rule itself



and become a “back door” for admitting otherwise inadmissible evidence.’ [Citation.]” (*People v. Fontana, supra*, 49 Cal.4th at pp. 362-363.) In light of these considerations, a trial court’s decision excluding evidence of a victim’s sexual history will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Bautista* (2008) 163 Cal.App.4th 762, 782.)

No such abuse appears here. Appellant contends the relevancy of the fact Leticia lied about her prior sexual relationship with Leo went beyond the basic issue of her credibility as a complaining witness. The way appellant sees it, the lie took on added significance because it was intertwined with the rape allegation that Leticia made to the police. It is true the police asked Leticia about her sexual history when she accused appellant of raping her. However, as the trial court correctly observed, the fact Leticia lied about her prior sexual relations with Leo when reporting appellant did not signal, one way or the other, whether she was telling the truth about what appellant had allegedly done to her.

Appellant argues the fact Leticia and Leo covered up their relationship shows they were conspiring to make Leticia’s allegations look better, so she would prevail in her civil case. But again, that theory assumes Leticia and Leo’s relationship had some bearing on the truthfulness of Leticia’s accusation against appellant, which is not correct. There are many reasons why an undocumented teenage girl might lie about having sex with an adult coworker as amply demonstrated by this case. We simply do not believe Leticia’s false statements on this issue were sufficiently probative to *substantially* outweigh their prejudicial effect and the time consumption and confusion of issues they would doubtless have occasioned. The jury was aware Leticia had filed a civil suit against the cleaners and that she had a financial motive to prevail in that suit. The presentation of additional evidence as to Leticia’s motive in that regard would have been cumulative at best. Moreover, judging by defense counsel’s offer of proof on the issue, which relied heavily on discovery generated in Leticia’s civil case and which even

the trial court had a hard time following, the proffered evidence would likely have been very confusing and time consuming. All things considered, the trial court did not abuse its discretion in excluding evidence of Leticia's prior sexual history under section 782.

#### IV

In instructing the jury, the court stated the prosecution was not required to prove the charged offenses occurred on the exact dates alleged in the information; rather, it would suffice if the offenses were proven to have occurred "reasonably close" to those dates. Appellant contends this was prejudicial error with respect to the charge involving Leticia, but we disagree.

Leticia testified, and the information alleged, appellant raped her on July 11, 2009. Appellant correctly notes that his roommate Huang testified that he did not see or hear Leticia at their house that day. However, appellant's defense was consent, not alibi or lack of opportunity to rape Leticia. In fact, in closing argument, his attorney flatly asserted that both victims "had sex with [appellant] because they wanted to." Since appellant did not allege "he was elsewhere or otherwise disenabled" from raping Leticia on the date alleged by the prosecution, the date was not a material element of the prosecution's case and the court did not err in failing to instruct the jury as such. (*People v. Barney* (1983) 143 Cal.App.3d 490, 497.)

In any event, the evidence universally and unequivocally pointed to July 11, 2009, as the exact date on which appellant allegedly raped Leticia. Since there is no possibility the jury convicted appellant of raping Leticia on any other date, it is virtually inconceivable how appellant could have been harmed by the court's instruction. The instruction was neither erroneous nor prejudicial on the facts of this case.

#### V

Appellant contends the prosecutor committed prejudicial misconduct in closing argument by vouching for the veracity of the victims. We do not find that to be the case.

In speaking to the issue of witness credibility in closing argument, the prosecutor told the jurors, “You can consider [their] opportunity to see and hear and their perception, their ability to remember and communicate, [their] quality and demeanor. Is it reasonable that Sonia and Leticia would talk to you about what happened to them in the way that they did and not be truthful? Is that reasonable? Because really nothing that I say or the defense counsel says can really make you believe one thing or another. You saw these women in person. They came in and told you what the defendant did. And you either believe them or you don’t.

“What I say or what [defense counsel] says may help you look at the evidence in a different light, but really when they sat here and told you what happened, that’s what it is. It’s – the People’s impression of the testimony is it was tested. It appeared credible.”

Appellant’s objection to this argument was overruled, but he maintains the prosecutor improperly vouched for the victims’ credibility by assuring the jury they were testifying honestly. “Impermissible ‘vouching’ may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness’s veracity . . . .” (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) But viewing the prosecutor’s statements as a whole, it appears he was actually trying to remove himself (and defense counsel) from the equation and let the jurors decide for themselves whether the victims were telling the truth. Although he signaled at the end of the above quote that he thought the victims were tested and appeared credible, the thrust of his argument was that it was up to the jury to decide the issue of credibility, based on the considerations he mentioned. We do not believe his comments rise to the level of misconduct.

Having rejected appellant’s prosecutorial misconduct argument, as well as his claims of instructional and evidentiary error, we necessarily reject his contention that cumulative error compels reversal of his convictions. We affirm his convictions and turn our attention to his various sentencing-related arguments.

## VI

Following the jury's verdict on the underlying charges, the trial court found true an allegation that appellant suffered a prior serious felony conviction for vehicular manslaughter in 1992. Based on that finding, the court doubled appellant's sentence on the substantive counts, pursuant to the Three Strikes law, and it also imposed a five-year enhancement on each count, pursuant to Penal Code section 667, subdivision (a).

However, vehicular manslaughter does not constitute a serious felony unless, during its commission, the defendant personally inflicted great bodily injury on a person other than an accomplice. (Pen. Code, § 1192.8, subd. (a); *People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1694.) As the Attorney General concedes, the prosecution did not present any evidence appellant personally inflicted great bodily injury on a person other than an accomplice when he committed his vehicular manslaughter offense. Therefore, the true finding on the prior serious felony allegation must be reversed and the matter must be remanded.

On remand, the prosecution may present additional evidence to establish appellant's conviction for vehicular manslaughter was a serious felony, in that he personally inflicted great bodily injury on a person other than an accomplice during that offense. Appellant argues double jeopardy principles preclude a retrial on that issue, but that argument has been rejected by both the California and the United States Supreme Court. (*People v. Monge* (1997) 16 Cal.4th 826, 837, *affd. sub nom. Monge v. California* (1998) 524 U.S. 721, 734; *People v. Barragan* (2004) 32 Cal.4th 236, 246-247.) Since then, Justice Thomas has expressed doubt about the continued validity of the authority upon which these cases are based. (*Shepard v. United States* (2005) 544 U.S. 13, 27-28 [conc. opn. of Thomas, J.].) But speculation in this regard does not permit us to ignore controlling Supreme Court authority on the issue. To the contrary, the doctrine of stare decisis compels us to conclude that retrial on the prior serious felony allegation does not

violate double jeopardy in this case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Ulloa* (2009) 175 Cal.App.4th 405, 414.)

If, on remand, the prosecution elects to proceed on the allegation and proves it to be true, the trial court shall so find. It shall then reinstate appellant's original sentence with but one exception upon which the parties agree: Since appellant's sentence on count 2 [rape of Sonia] was ordered to run concurrently with his sentence on count 1 [digital penetration of Sonia], the trial court may not impose a consecutive five-year enhancement on count 2 pursuant to Penal Code section 667, subdivision (a). Instead, to be consistent with the underlying sentence on count 2, the court must order the enhancement to run concurrently with appellant's sentence on count 1. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.)

## VII

Appellant also contends the trial court erred in refusing to dismiss his prior serious felony conviction for purposes of the Three Strikes law. We find no abuse of discretion in this regard.<sup>6</sup>

Trial courts are empowered to dismiss a prior serious felony conviction if doing so would further the ends of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* 13 Cal.4th 497, 507-508.) In deciding whether to exercise this power, a court must consider the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of criminal cases. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530.) Ultimately, the court must determine "whether, in light of the nature and circumstances of his present felonies and prior [convictions], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should

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<sup>6</sup> In light of our ruling in the previous section, we recognize this issue only has relevance if, on remand, the prosecution proves that appellant's 1992 conviction for vehicular manslaughter constitutes a prior serious felony in that appellant personally inflicted great bodily injury on a person other than an accomplice during that offense.

be treated as though he had not previously been convicted of one or more [strikes].”  
(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court’s failure to dismiss a prior conviction allegation is reviewed for an abuse of discretion — a most deferential standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In fact, only in “an extraordinary case — where the relevant factors described [above] manifestly support the [dismissing] of a prior conviction and no reasonable minds could differ” would the failure to dismiss constitute an abuse of discretion. (*Id.* at p. 378.) This is not such a case.

In addition to being convicted of vehicular manslaughter in 1992, appellant has also been convicted of driving under the influence (in 1988 and 1992) and hit and run driving (in 1989). The record also indicates that, besides raping the two victims in this case, he has also preyed on other women in the past. In fact, when Leticia told Flor what happened to her after Jose took her to appellant’s house, Flor said, “it’s not the first time they’ve done that.” And in carrying out the attack against Leticia, appellant told her that he knew she was an illegal immigrant, and if she tried to tell anyone about the incident, it would be his word against her word. That is exploitation in its worst form.

While exploitation and intimidation were at the root of the attack on Leticia, appellant used more subtle means to achieve his conquest of Sonia. Sonia’s husband worked at appellant’s business and Sonia considered appellant to be her friend up until the time he raped her. It is readily apparent appellant violated a position of trust in carrying out his crimes against Sonia and that he used his familiarity with her as a means to perpetrate a very serious offense.

Considering all the pertinent circumstances, we believe there is sufficient evidence to support the trial court’s decision to treat appellant as a repeat offender under the Three Strikes law. We find no abuse of discretion in the court’s refusal to dismiss appellant’s prior serious felony conviction for purposes of that law.

## DISPOSITION

The judgment of conviction is affirmed. The true finding on the prior serious felony allegation is reversed and the sentence is vacated. The case is remanded for a retrial on the prior serious felony allegation if the People so elect, or for a new sentencing hearing if the People do not go forward on the allegation in a timely manner. After resentencing, the trial court shall prepare a modified abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.